

Clarifications on Motions to Compel

I. With Respect to the City's Response to the District's Request for Admissions and Interrogatories:

In the first set of Interrogatories and Request for Admissions sent to the City, the City simply objected to virtually every question contending that the questions were not capable of comprehension. The District's First Set of Interrogatories and Request for Admissions are attached to this e-mail. Thus, the City found reason not to have to respond to most of the District's discovery requests of this nature. In lodging this position, the City advanced vigorous, if not borderline mean-spirited, objections to the phraseology of virtually everything the District attempted.

Rather than pursue an initial motion to compel, the District simply opted to labor to attempt to clarify its questions and alleviate the City's persnickety attacks on the wording. This was done even though the District believed that a reasonable, ordinary person could have understood the questions posed. Nonetheless, the District attempted to remedy concerns raised by the City by tightening definitions and further specifying the language. Accordingly, the District submitted a Second Set of Interrogatories and Second Set of Request for Admissions to the City. These are also attached to this e-mail.

Despite the District's efforts to close the alleged loopholes the City attempted to hide behind in failing to answer the first sets, the City staked out a similar position in responding to the second sets of discovery. For example, on the Second Set, the first request for admission asked the City to "Admit or deny that no water will actually physically be injected into the Aquifer when an AMC is accumulated (as opposed to a Physical Recharge Credit)." The City objected to this request as "ambiguous and irrelevant" and as failing to understand the accounting process. The City then responded with the following answer:

The AMC proposal describes the interactive accumulation of physical recharge credits and AMC recharge credits. The City will continue to conduct physical recharge operations based on the condition and capacity of the aquifer to accept physical recharge. During any given year, the City may conduct activity giving rise to both types of credits and during any given year, the City may or may not be physically injecting water in the Aquifer at the time accumulation of credits calculated and reported.

The City's response simply states that both types of recharge credits could occur in a given year and thus water could be injected into the Aquifer. However, this obviously ignores the question. It is also interesting that the City's response utilizes a similar distinction and seemingly less precise language than the request the City objected to in the first place.

The City also challenged the specific terminology used by the District. The District modeled its questions around the exact definitions used in the regulations at issue. For example, in its response to the District's second request for admission (in the Second Set), the City says "'source water'" (whatever that is)... Obviously, source water is defined term in the regulations and this response by the City was either just another attempt to attack the District's approach or indeed was based on a complete lack of awareness of

the regulations at issue. Request number 15 asks about safe yield and the City’s response is completely evasive based on a baseless objection. Obviously, as explained at the hearing, it is highly relevant whether safe yield applies.

The above flavor of evasive responses of the City are seen throughout the City’s answers. The above explanation is not an exhaustive list. However, by reviewing the City’s answers and understanding that the District’s language was based on regulatory definitions, it is easy to ascertain that the City should be ordered to properly answer the questions.

II. With Respect to the City’s Privilege Log:

Requested Document	City’s Asserted Privilege	District’s Reason for Production
Scott Macey August 31, 2018 emails to Brian Meier and Joe Pajor regarding progress drafts of discovery responses, and its attachments	Attorney-client and work product	No attorney is involved in this e-mail so attorney/client cannot apply (although work product might)
August 31, 2018 email of Scott Macey to Brian Meier and Daniel Clement regarding ASR events calendar	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
September 4, 2018 follow-up email of Scott Macey to Luca DeAngelis re expert witness overview	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information. .
September 4, 2018 Response	Work product	Same as above.
Michael Jacobs email of 8/30/2018 to Stan Breitenbach, Scott Macey, re On Call Task Orders	Work Product	Completely unclear if “On Call Task Orders” are work product, as specified above, or ordinary business records.

Scott Macey email of 8/31/2018 to Scott Macey re ASR Events Calendar	Work Product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
Scott Macey email of 8/31/2018 to Joseph Pajor re Response to DWR GMD 4	Work Product	As work product limitations are specified above, it is impossible to determine if it applies based on the description furnished by the City.
Cherwell email of 9/4/2018 to Joseph Pajor re Service Request 94552 has been resolved	Attorney/Client privilege	No attorney is involved in this communication.
Joseph Pajor email of 9/6/2018 to Scott Macey, re In re City of Wichita's Phase II ASR, 18 WATER 14014	Attorney/Client privilege	No attorney is involved in this communication.
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“	“	“
Scott Macey email of 9/6/2018 re On Call Task Orders	Work product	Completely unclear if “On Call Task Orders” are work product, as specified above, or ordinary business records.
Scott Macey email of 9/6/2018 to Joseph Pajor re File Location	Work product	Completely unclear if “File Location” constitutes work product, as specified above, or an ordinary business record.
Scott Macey email of 9/7/2018 to Daniel Clement re ASR Proposed Minimum Index Levels	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.

Joseph Pajor email of 9/10/2018 to Don Henry, Brian Meier, Daniel Clement, re Wichita ASR Update	Attorney/client	No attorney is included in this communication.
Joseph Pajor email of 9/10/2018 to Alan King, Don Henry, Brian Meier, Daniel Clement, re ASR Case	Attorney/client	“
Daniel Clement email of 9/10/2018 to Scott Macey re ASR Drought Modeling Report Supplemental Figures	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is highly relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
Scott Macey email of 9/10/2018 to Daniel Clement re ASR Drought Modeling Report Supplemental Figures	Work product	“
Brian Meier email of 9/11/2018 to Joseph Pajor re DWR Offer Suggestion	Work product	It is impossible to see how this is work product, as defined above.
“	“	“
Scott Macey email of 9/11/2018 to Daniel Clement re ASR Drought Modeling Report Supplemental Figures	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is highly relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
Brian Meier email of 9/12/2018 to Joseph Pajor re DWR Offer Suggestion	Work product	It is impossible to see how this is work product, as defined above.
McGown, Tyler email of 9/12/2018 to Scott Macey, etc. re On Call Task Orders	Work product	Completely unclear if “On Call Task Orders” are work product, as specified above, or ordinary business records.

Scott Macey email of 9/6/2018 to Don Henry re On Call Task Orders	Work product	“
Brian McLeod email of 9/18/2018 to David Barfield, Kenneth Titus, Tom Adrian, dave@aplawpa.com	Attorney/client privilege	Although it appears that the District would have this e-mail anyway, obviously it can't be subject to attorney/client privilege since it was sent to third parties and no client was involved in the communication.
Scott Macey email of 9/18/2018 to Brian Meier, Daniel Clement re Required Notices	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
Scott Macey 9/19/2018 emails (excluding Brian McLeod) re Events Calendar to Crosscheck	Work product	Completely unclear if “Events Calendar” is work product, as specified above, or ordinary business record.
Scott Macey email of 9/20/2018 to Scott Macey re DWR Meeting Minutes Revisions	Work product	It is impossible to understand how revising minutes of DWR would somehow be work product since it is a document not prepared for the City.
Joseph Pajor email of 9/26/2018 to Alan King, Don Henry, Scott Macey, Brian Meier, Daniel W. Clement re In re Wichita's ASR Project	Attorney/client privilege	No attorney is involved in this communication.
Paul McCormick email of 9/27/2018 to Scott Macey re Commentary on model changes	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is highly relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.

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Two Paul McCormick response emails of 9/28/2018	“	“
Don Henry email of 9/28/2018 to Scott Macey re ASR Data Transmittal Letter	Work Product	Completely unclear if “ASR Data Transmittal Letter” is work product, as specified above, or ordinary business record.
Scott Macey emails re ASR Transmittal Letter (not including Brian McLeod)	“	“
Scott Macey email of 9/28/2018 to Lane Letourneau re GMD2 letter request	Work product	This is communication with another party. It obviously can’t be work product. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the City in this litigation instead of maintaining an independent agency role.
Scott Macey email of 9/28/2018 to Lane Letourneau, Aaron Oleen, Alan King, Brian McLeod re ASR Groundwater Modeling Data Submittal	Work product and attorney client privilege.	Same rationale as above. Further, asserting the attorney/client privilege in this case only exacerbates the concern for bias as Aaron Oleen is not an attorney for the City. Further, any such privilege is waived.
Joseph Pajor email of 10/1/2018 to Brian Meier, Daniel Clement re Wichita ASR Minutes from September 18, 2018 Hearing	Attorney/client privilege	No attorney is involved in this communication.
Scott Macey email of 10/1/2018 to Lane Letourneau re Letter to GMD2 on ASR rule, moving forward	Work product	This is communication with another party. It obviously can’t be work product. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the City in this litigation instead of maintaining an independent agency role.
Scott Macey email of 10/19/2018 to Scott Macey re DWR Events Calendar	Work product	Completely unclear if “Events Calendar” is work product, as specified above, or ordinary business record.

Scott Macey email of 10/19/2018 to Scott Macey re DWR Meetings Calendar	Work product	Completely unclear if “Meetings Calendar” is work product, as specified above, or ordinary business record.
Scott Macey email of 10/24/2018 to Penny Feist re ASR Website Update	Work product	This was not created at the direction of an attorney nor crafted solely for the purpose of aiding the litigation. It is merely a normal business record. Further, it is highly relevant to the subject matter and only the City can produce this information. Thus, the District would be prejudiced if it is not produced. The City must furnish this information.
“, Jennifer Hart	Work product	“
“, minus Penny Feist	“	“
“	“	“
Scott Macey email of 10/24/2018 to Jennifer Hart re Files to add to Wichita.gov website	“	“
Nelson, Ben email of 10/24/2018 to Scott Macey re 1% Drought	“	“
McGown, Tyler email of 10/25/2018 to Scott Macey, Brian Meier, Daniel Clement re On Call Task Orders	Work product	Completely unclear if “On Call Task Orders” are work product, as specified above, or ordinary business records.
Scott Macey emails of 10/25/2018 to Jennifer Hart re more files	Work product	It is impossible to ascertain if work product applies.
Scott Macey emails of 10/25/2018 re On Call Task Orders	Work product	Completely unclear if “On Call Task Orders” are work product, as specified above, or ordinary business records.

III. With respect to DWR’s Privilege Log:

DWR Privilege Log No.	Description	DWR Privilege Claim	GMD2 Reason for Production
1, 8, 11, 34, 39	6-27-2018 Email Communications (re AO legal input/advice re C.E.’s draft presentation-summary of Wichita’s ASR Phase II modification requests)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. No indication of what litigation is anticipated.
13 through 30, 46	3-4-2016 through 5-18-2016 Email Communications (re AO legal input/advice re draft Order Approving Available Recharge Credits as of 2014)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2016 unless the City’s Proposal submitted in March 2018, was already being considered by DWR. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.
36, 57	4-18-2018 (No. 36) and 4-17-2018 (No. 57) Email Communications (discussion of KT’s legal input/advice re why C.E. not delegating presiding-officer hearing	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were “independent,” then such communications would waive any attorney/client privilege.

	authority)		Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.
37	7-16-2018 Email Communication (KT legal advice re separation of C.E./Presiding Officer group and DWR group, for purposes of the Wichita ASR Phase II modification-request hearing matter)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. The District needs this document to determine how DWR and the CE planned to be separate. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.
38	7-18-2018 Email Communication (re ABO legal advice re DWR group's testimony at Wichita ASR Phase II modification-request hearing)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	Since DWR didn't submit any expert reports, the District needs information as to what level DWR has reviewed the City's Proposal. This document may assist in that. No indication of what litigation is anticipated.
44	12-18-2017 Email Communication (discussion of KT's legal input/advice re why C.E. not delegating presiding-officer hearing authority)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2017 unless the City's Proposal submitted in March 2018, was already being considered by DWR. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.

47	10-1-2015 Email Communication (re RL legal advice re whether public hearing required concerning ASR Phase II)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2015 unless the City's Proposal submitted in March, 2018, was already being considered by DWR
54	7-16-2018 Email Communication (KT legal advice re separation of C.E./Presiding Officer group and DWR group, for purposes of the Wichita ASR Phase II modification-request hearing matter)	K.S.A. 60-426: Attorney client privilege;	This is communication between one party (DWR) and the Chief Engineer / Hearing Officer. Unclear when the Chief Engineer became Hearing Officer. If it is somehow work product, then DWR should be disqualified as an independent party for collaborating with the then Hearing Officer in this case instead of maintaining an independent agency role. The District needs this document to determine how DWR and the CE planned to be separate. No indication of what litigation is anticipated. Further, if the Hearing Officer and DWR were "independent," then such communications would waive any attorney/client privilege. Certainly, the Hearing Officer couldn't be involved in preparing litigation, even if it was anticipated at that point.
60	11-05-2004 Internal Memo (LR legal analysis re certain change apps & proposed new app from Wichita, pertaining to Wichita ASR)	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2004. This document may provide insight into the details and rational for certain ASR permit conditions. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.
61	10-11-2004 through 10-12-2004 email communications (LR legal input/advice re draft pre-hearing order in Wichita ASR matter)	K.S.A. 60-426: Attorney client privilege	This document may provide insight into the details and rational for certain ASR permit conditions. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery.

62	10-8-2004 email communication and draft memo (JB's draft memo & identified issues to LR re certain apps filed by Wichita for the ASR project	K.S.A. 60-426: Attorney client privilege; K.S.A. 60-226(b)(4): Document prepared in anticipation of litigation	No indication of what litigation is anticipated and why DWR would be anticipating litigation in 2004. This document may provide insight into the details and rational for certain ASR permit conditions. Further, these were routine business decisions which are generally not subject to insulating with an attorney/client privilege. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery. Certainly, with respect to work product doctrine, proximity in time to litigation is an important factor and the litigation must be anticipated. It is impossible in this situation.
64	6-23-2005 email communications (re propriety of adding certain findings to an ASR order	K.S.A. 60-426: Attorney client privilege	This document may provide insight into the details and rational for certain ASR permit conditions. Merely adding an attorney to a communication (such as a business record) otherwise not subject to a privilege cannot automatically protect it from discovery.